

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 18, 2007

**TRACY F. LEONARD v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Montgomery County**  
**No. 40494    Ross H. Hicks, Judge**

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**No. M2006-00654-CCA-R3-PC - Filed July 5, 2007**

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The Petitioner, Tracy F. Leonard, was convicted of first degree premeditated murder, felony murder, two counts of especially aggravated kidnapping, rape, and theft over \$1,000. The trial court merged the convictions for first degree premeditated murder and felony murder and also merged the two convictions for especially aggravated kidnapping into a single conviction. The Petitioner received a sentence of life for first degree murder, twenty-five years for especially aggravated kidnapping, eight years for rape, and two years for theft over \$1,000. The trial court ordered that the sentences for especially aggravated kidnapping and rape be served consecutively to the life sentence and consecutively to each other and that the sentence for theft be served concurrently with the sentence for rape. On direct appeal, this Court affirmed the convictions and sentences for first degree murder, especially aggravated kidnapping where the victim suffered serious bodily injury, rape, and theft over \$1,000. However, this Court reversed the Petitioner's conviction for especially aggravated kidnapping accomplished by the use of a deadly weapon because of the trial court's failure to instruct the jury as to lesser-included offenses. The Petitioner filed a petition for post-conviction relief, which was denied by the post-conviction court. The Petitioner now asserts that he received the ineffective assistance of counsel, that his protection against double jeopardy was violated, that his convictions were based on actions of a grand jury and petit jury that were unconstitutionally impaneled, and that the jury instructions were unconstitutional. Finding no error, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; John W. Carney, District Attorney General; and Helen Young, Assistant District Attorney General, for the appellee, State of Tennessee.

Kathryn B. Stamey, Clarksville, Tennessee, for the appellant, Tracy Frank Leonard.

## **OPINION**

### **Factual Background**

#### **A. Trial and Direct Appeal**

This case arises from the especially aggravated kidnapping, rape, and murder of the Petitioner's ex-wife, Ms. Cherilyn Leonard, and the theft of an acquaintance's vehicle used during the commission of the crimes. At trial, the Petitioner did not deny shooting the victim; however, he claimed that he did not kidnap or rape her and that the shooting was not premeditated. The factual basis for the convictions were summarized by our Court on direct appeal as follows:

On November 19, 1996, Crystal Jarrett, who was working at the Econo Lodge motel located at 201 Holiday Road in Clarksville, observed the victim, Cherilyn Leonard, enter the motel lobby at approximately 8:30 a.m. and sit in a chair. Seconds later, the [Petitioner] entered the lobby and sat next to the victim. Shortly thereafter, the victim approached the front desk and asked whether there was a pay telephone in the motel. Ms. Jarrett informed the victim that there was no pay telephone, but permitted her to use the house telephone located near the public restrooms. The victim walked toward the phone and the [Petitioner] "followed right on her tail." According to Ms. Jarrett, the [Petitioner] "stood about eight inches" from the victim as she made a telephone call. Ms. Jarrett recalled that "the phone slammed on the hook" and the [Petitioner] then dragged the victim out of the lobby. While being pulled from the lobby area, the victim remarked to Ms. Jarrett that she and the [Petitioner] "would be checking out," giving her room number as 211. The victim added that Ms. Jarrett "could call the police now." After the victim and [Petitioner] exited the lobby, Ms. Jarrett heard a woman shouting. Before Ms. Jarrett could telephone the police, she heard a gunshot. According to Ms. Jarrett, the victim ran into the motel vestibule then "her arm hit the glass door and she fell backward against the bookcase and then [the Petitioner] was right there on her and then he shot her." Ms. Jarrett heard the victim scream once. Ms. Jarrett conceded that she did not observe the first gunshot, but had watched as the [Petitioner] "hovered over" the victim. Ms. Jarrett testified that after the [Petitioner] shot the victim, he looked at her "very angry." His expression then turned to one of fear and he ran out the door.

Jerry Tams, a resident of Florida who was staying at the Econo Lodge on the morning of the shooting, stated that he was preparing to leave the motel when he heard "a little bit of noise" coming from the lobby. When he turned to look, he saw "a gentleman with his arms around a girl." Mr. Tams overheard the girl say "something to the effect of oh, no please stop" before the couple fell to the ground. Mr. Tams recalled the subsequent events as follows:

She broke his hold. He was able to get his left knee on her and hold her down with his left hand and as that was going on, she was still screaming, please stop,

please stop, or something like that. And I saw him reach into his right pocket and pull out a black semi-automatic weapon and shoot her with it. . . . As he got the weapon out of his pocket, he chambered the bullet into the barrel and held the gun down and pulled the trigger once. I believe he tried to pull the trigger again and [the gun] misfired because he rechambered another bullet.

After Mr. Tams saw the victim run into the lobby followed by the [Petitioner], he heard more gunshots from inside the lobby. Fearful for his family, Mr. Tams hurried his wife and son into their camper. Shortly thereafter, the [Petitioner] exited the motel, looked around, and walked very quickly away from the motel. Mr. Tams recalled that, prior to the shooting, he had seen the victim and the [Petitioner] sitting together in the motel lobby. He testified that the victim was “smiling and laughing.” Deborah Jean Tams provided essentially the same account as her husband Jerry. She added that the [Petitioner] appeared angry, but not nervous, during the incident.

Clarksville Police Officer John Douglas testified that he was parked at a Texaco Station approximately one hundred yards away from the motel when he received a report of the shooting. Upon arriving at the motel, he checked its perimeter to determine if the [Petitioner] was still on the premises but discovered no one.

Officer Timothy Saunders, who was working for the Clarksville Police Department, participated in a search of room 211. No personal property belonging to either the [Petitioner] or the victim was found during the search.

Luigi Agostini, a United States Army Criminal Investigation Agent, testified that the [Petitioner] surrendered to authorities at Fort Campbell two days after the shooting. According to Agostini, the [Petitioner] “looked like he had been out for quite a while, he was dirty and he was also injured.” At the time of his surrender, the [Petitioner] was driving a red Honda automobile. A search of the vehicle yielded a Glock .45 caliber handgun, two plastic bags containing .45 caliber ammunition, and seven magazines loaded with .45 caliber ammunition in the front passenger seat. Additionally, the vehicle contained camping gear, fishing line and hooks, plastic flex-type handcuffs, a roll of duct tape, eleven condoms, and a jar of Vaseline.

Detective Robert Miller of the Clarksville Police Department was in charge of the investigation into the victim’s death. During his investigation, he learned from Merlyn Moore, who worked as a desk clerk at the Econo Lodge on the night before the shooting, that the [Petitioner] was alone when he checked into room 211 at 9:38 p.m. The address listed on the registration card for room 211 was the [Petitioner’s] home address. The vehicle was described on the card as a “pinkish colored” Honda Prelude. Miller later determined that the title registration of the vehicle was in the

name of Roderick Smith, the [Petitioner's] roommate.

Dr. Joseph Eugene Dyer, a forensic pathologist at Blanchfield Army Community Hospital, testified that the victim sustained three gunshot wounds to the chest and one gunshot wound to the arm. He explained that, while all three wounds to the chest were potentially fatal, two of the wounds would have caused immediate death. Dr. Dyer stated that because he was not provided with the clothing that the victim was wearing at the time of the shooting, he was unable to determine the distance from which the shots were fired. He noted, however, that the presence of soot, stippling, and an area of scorch on the victim's forearm indicated that one shot was fired from a distance of less than one foot. Dr. Dyer testified that a sexual assault examination was performed on the victim and specimens obtained during the examination were given to the Clarksville Police Department. Testing later revealed the presence of sperm in the victim's vaginal and anal cavities that had been deposited only six to ten hours prior to the victim's death. On cross-examination, Dr. Dyer related that there were no physical signs of restraint, such as ligature marks, on the victim's body. Additionally, he testified that the presence of "necrotic decidua" in the victim's uterus was consistent with the victim having had an abortion one and one-half months prior to her death in November of 1996. Other evidence established that the victim had an abortion in October of that year.

Agent Samera Zavara of the TBI obtained DNA profiles from samples of the victim's blood, the [Petitioner's] blood, and the specimens taken from the sexual assault examination. She concluded that the DNA profile of the sperm present in the victim's vagina and anus was consistent with that of the [Petitioner]. Agent Zamara testified that "in the Caucasian population, approximately one in six thousand two hundred individuals that are unrelated would have this combination, this DNA profile."

Attorney Christine Zellar-Church represented the victim in her divorce from the [Petitioner] in the summer of 1996. Ms. Zellar-Church testified that the victim told her that domestic violence "had been a problem between her and the [Petitioner] for some time." Ms. Zellar-Church recalled that they had discussed the possibility of obtaining an order of protection but the victim related that she had moved to a different town and no longer felt threatened by the [Petitioner]. The marital dissolution agreement entered into by the parties provided that the [Petitioner] "would not interfere with [the victim] and her new life, that he would leave her alone." The divorce became final in July of 1996.

Larry E. Reeb, the [Petitioner's] commanding officer at Fort Campbell, recalled that the [Petitioner], who was trained as a Special Forces soldier, purchased a gun in November of 1996. Reeb also recalled that the [Petitioner] told him he was experiencing financial difficulties.

Nancy Leonard testified that she was married to the [Petitioner] twice. According to Ms. Leonard, the couple met and married in 1990 while serving in the military. While on duty in North Carolina, the [Petitioner] became romantically involved with the victim. He divorced Ms. Leonard shortly before the birth of their second child and married the victim. While married to the victim, the [Petitioner] rekindled his romance with Ms. Leonard. After divorcing the victim, the [Petitioner] remarried Ms. Leonard. After she was sent to North Carolina for training, Ms. Leonard returned home to Clarksville on a weekend pass and discovered the [Petitioner] and victim in a compromising position. Shortly thereafter, the [Petitioner] divorced Ms. Leonard and remarried the victim. Ms. Leonard testified that the victim did not like the [Petitioner's] children from his first marriage and considered them a burden on her relationship with the [Petitioner].

Ms. Leonard recalled that three months before the shooting, the [Petitioner] told her that the victim had ruined his life and destroyed him financially. Additionally, he admitted that he "had tied [the victim] up and tortured her for hours in March of that year." The [Petitioner] informed Ms. Leonard that "he had to finish it." Ms. Leonard stated that the victim, who confirmed the March incident, was not surprised when Ms. Leonard told her of the [Petitioner's] statements. The victim remarked to Ms. Leonard that she was protected by the "guidelines" of her divorce agreement. When Ms. Leonard spoke with the victim in October of 1996, the victim expressed her belief that the [Petitioner] would kill her.

Steven Hinson, who worked with the victim, testified that in March of 1996, about eight months before the shooting, the victim arrived at his apartment unannounced and claimed that she had been raped by the [Petitioner]. The victim showed him rope burns on her wrists and legs and, because of her fear of the [Petitioner], asked to stay at Hinson's apartment. The victim refused to report the incident to police.

Angela Murphy, a friend of the victim, testified that during the summer before the shooting, the victim often commented that she no longer cared for the [Petitioner] and wanted the marriage to end. The victim informed Ms. Murphy that the [Petitioner] had hurt her in May of 1996 and that she was going to leave him. The victim also told Ms. Murphy that she would file a restraining order against the [Petitioner] if he ever hurt her again. Ms. Murphy testified that she helped the victim leave the [Petitioner].

George Elliot Matthews, a co-worker, testified that he began dating the victim approximately three weeks before her murder. He stated that he last spoke with her on the night before the shooting shortly before she was scheduled to begin her shift at 8:30 p.m. He telephoned her apartment at approximately 8:00 p.m., got no answer, and left a message on her answering machine. The victim returned the phone call approximately five minutes later, explaining that she had been drying her hair and indicating that she would report to work as scheduled. According to Matthews, the victim had told him that "it would suit her perfectly fine if she never had any dealings with [the Petitioner] again."

Jerry White, the victim's supervisor at the Postal Service, testified that she was given several warnings because of excessive absences from work. White recalled that the victim was eventually suspended for seven days due to the unexcused absences. The victim blamed her absences on personal problems, claiming that she feared the [Petitioner] and believed that he had been following her.

Patricia Brantley, a friend of the [Petitioner], testified that on the day before the shooting, the [Petitioner] asked to borrow her vehicle, a red Honda Civic, explaining he needed to run errands and needed a vehicle bigger than the Honda Prelude which belonged to his roommate. Ms. Brantley, who worked at a McDonald's restaurant, loaned her car only after the [Petitioner] agreed to return the vehicle before her shift ended at 2:00 a.m. the next morning. The [Petitioner] never returned the vehicle, which was valued at approximately \$3,500.00. This testimony provided the basis for the theft conviction.

Merlyn Moore, who was working as a desk clerk at the Econo Lodge on the evening before the shooting, testified that the [Petitioner] checked into the motel at 9:38 p.m. Moore recalled that the [Petitioner] appeared to be in a hurry.

LaQuita Denise Stagner, the victim's neighbor, testified that she observed the victim fighting with a man in the parking lot outside of her apartment at approximately 8:00 p.m. the night before the shooting. Although unable to hear their conversation, Ms. Stagner recalled that the two argued loudly and were involved in physical contact. Ms. Stagner stated that during the argument, the victim remained seated in the driver's side of her Jeep with the door open and the man stood "in the door." According to Ms. Stagner, the man "move[d] [the victim] over into the passenger side" before he entered the Jeep and sat in the driver's seat. Ms. Stagner recalled that she left for work and when she returned to her apartment at approximately 10:00 p.m., the Jeep was parked on the opposite side of the parking lot from the victim's usual parking space.

Tia Ayers, who worked with the victim, received a telephone call from the victim on the morning of the shooting. The victim asked Ms. Ayers to feed her cat, explaining that she was with the [Petitioner], who had kidnapped her. She then told Ms. Ayers to call the police. The telephone went dead as Ms. Ayers asked the victim questions in an attempt to ascertain her whereabouts. Ms. Ayers immediately informed Metro Police that the victim had been kidnapped and that she was unaware of the victim's location. After she spoke with police, Ms. Ayers dialed "\*69" and learned that the victim had called from the Econo Lodge in Clarksville. Ms. Ayers testified that in the months prior to the shooting, the victim had confided to her that she believed the [Petitioner] was stalking her and expressed her desire to be left alone. Ms. Ayers acknowledged that the victim had met with the [Petitioner] on previous occasions since their divorce, but explained that the victim had instructed Ms. Ayers to call her house to check on her well-being one hour after any meeting the victim had with the [Petitioner]. According to Ms. Ayers, the victim said she should call the police if she was not home an hour after meeting with the [Petitioner].

Detective Cheryl Anderson of the Metro Police Department visited the victim's apartment on the morning of the murder and observed no evidence that a struggle had occurred inside the apartment.

The [Petitioner], who testified in his own behalf, met the victim while deployed in North Carolina in the early spring or summer of 1992. While still married to Nancy Leonard, the [Petitioner] became romantically involved with the victim. Soon after the [Petitioner] returned to Fort Campbell to be with his wife and children, the victim began calling his home. The [Petitioner] then obtained a divorce from Nancy Leonard and married the victim. Later, the [Petitioner] rekindled his relationship with his first wife, after which the victim volunteered to go to Somalia as part of her military duty. When she returned from Somalia, the [Petitioner] divorced the victim and remarried Nancy Leonard. During his second marriage to Nancy Leonard, the [Petitioner] again became romantically involved with the victim. A divorce ensued, and the [Petitioner] began living with the victim in her apartment. The victim ultimately moved into the [Petitioner's] residence and they were remarried in December of 1995. The [Petitioner] denied having attacked the victim in March 1996, claiming that he was in Fort Bragg, North Carolina, where he had been sent for language training. Telephone records established that telephone calls were made from the [Petitioner's] residence in Clarksville to Fort Bragg on March 22, 24, 25, and 27, and calls were made on the [Petitioner's] calling card from Fort Bragg to his home on March 21, 24, 25, 26, 27, 28, and 31. In May of 1996, the victim left the [Petitioner] and moved to Antioch where she filed for divorce. According to the [Petitioner], the victim continued to meet with him after she moved and they would "usually go to a restaurant and go to a motel afterwards."

The [Petitioner] testified that he purchased a .45 caliber gun in November of 1996 from a man in Columbia, Tennessee in order to be better prepared for Special Forces qualification. The weapon was registered "on post at the gate four MP Station." The [Petitioner] claimed that he planned to go on leave on November 19, 1996 to take a canoe trip. Because his plans were uncertain, however, he also prepared to work on November 19. The [Petitioner] borrowed Samuel Kamacho's Mitsubishi truck on November 18 and returned it the same day. Later, he borrowed Patricia Brantley's Honda Civic vehicle because he was meeting the victim that evening and she would not ride in his roommate's "pink, low-rider, Honda Prelude."

According to the [Petitioner], when he arrived at the victim's apartment, the victim initially insisted on driving her Jeep, but they eventually left in Ms. Brantley's Honda Civic. The [Petitioner] claimed that the victim asked to go to a motel. While the [Petitioner] checked into the Econo Lodge in Clarksville, the victim remained in the vehicle. After securing a room, the [Petitioner] and the victim talked and watched television before having sexual intercourse. The [Petitioner] testified that during the

evening, the victim expressed her continued love for him.

According to the [Petitioner], on the next morning, the victim told him that she was worried about getting pregnant and informed him that she had been pregnant before. After the [Petitioner] asked what she meant, the victim “smirked” and walked out of the room. He persisted in his inquiry as they walked across the parking lot and, according to the [Petitioner], the victim ignored him. At that point, the [Petitioner] retrieved his gun from his ruck sack, which was in the vehicle they had driven to the motel. The [Petitioner] found the victim in the lobby sitting on a couch. According to the [Petitioner], the victim continued to smirk when he asked her questions about the previous pregnancy. Eventually, the victim admitted that she had been pregnant recently and that she did not know who fathered the baby. The victim then walked to the front desk and asked the clerk about a phone. When she walked to the house telephone, the [Petitioner] followed, still questioning her about the pregnancy. He admitted that he hung up the phone and, when the victim attempted to walk away, grabbed her. The [Petitioner] claimed that after they went outside, “everything happened real fast.” According to the [Petitioner], they fell to the ground, and he shot her. While admitting responsibility for the shooting, the [Petitioner] claimed that he had not planned to kill the victim. The [Petitioner] testified that after shooting the victim, he drove to Kentucky and stayed for approximately two and one-half days before calling his mother to make arrangements to surrender to authorities. Later, the [Petitioner] surrendered to authorities at Fort Campbell.

State v. Tracy F. Leonard, No. M2001-00368-CCA-R3-CD, 2002 WL 1987963, at \*1-6 (Tenn. Crim. App., Nashville, Aug. 28, 2002) (footnotes omitted), perm. to appeal denied, (Tenn. Dec. 16, 2002).

The Petitioner was convicted of first degree premeditated murder, felony murder, two counts of especially aggravated kidnapping, rape, and theft over \$1,000. Id. at \*1. “The trial court merged the convictions for first degree premeditated murder and felony murder and also merged the convictions for especially aggravated kidnapping into a single conviction.” Id. “The [Petitioner] received a life sentence for first degree murder, twenty-five years for especially aggravated kidnapping, eight years for rape, and two years for theft over \$1,000.” Id. The trial court ordered that the sentences for especially aggravated kidnapping and rape be served consecutively to the life sentence and consecutively to each other and that the sentence for theft be served concurrent with the sentence for rape. Id.

On direct appeal, this Court affirmed “the convictions and judgments for first degree murder, especially aggravated kidnapping where the victim suffers serious bodily injury, rape, and theft over \$1,000.” Id. This Court also affirmed the sentences. Id. However, we reversed the Petitioner’s conviction for especially aggravated kidnapping accomplished by use of a deadly weapon “because of the trial court’s failure to instruct the jury as to lesser-included offenses.” Id.

## **B. Post-Conviction Review**

The Petitioner filed a petition for post-conviction relief, which was later amended by counsel. The amended petition contained four assertions of ineffective assistance of counsel:<sup>1</sup> (1) counsel did not adequately prepare for witness LaQuita Stagner's trial testimony because she was unable to locate the witness before trial; (2) counsel did not obtain discovery of an audio-taped interview of Tia Ayers until after the trial, which allegedly would have refuted her trial testimony regarding the relationship between the Petitioner and the victim; (3) counsel did not adequately investigate phone records that would have shown that the victim was actively contacting the Petitioner "shortly" before her death, contrary to testimony at trial that the victim was extremely afraid of the Petitioner and was avoiding contact with the Petitioner; and (4) counsel did not adequately investigate an incident of potential jury tampering at a restaurant where a State witness was unsupervised along with a juror in the bathroom.

The amended petition also "adopt[ed] by reference all grounds set forth in his original petition for post-conviction relief[,] which included allegations of a double-jeopardy violation, an unconstitutional jury charge, and an unconstitutionally selected and impaneled petit jury and grand jury. Although the Petitioner asserts these constitutional issues separately from the claims of the ineffective assistance of counsel, the petition states that these claims were not raised on direct appeal because "this petition raises claims of ineffective assistance of counsel for failing to raise these grounds for relief." The post-conviction court held a hearing on the Petitioner's petition, and both counsel and the Petitioner testified with regard to the issues raised in the petition as follows.

### **1. Preparation for Witness LaQuita Stagner**

With regard to the Petitioner's allegation that counsel did not investigate and prepare for witness LaQuita Stagner, counsel testified that her investigator tried calling Ms. Stagner at the phone number "that was provided by the State" but was "never able to make contact with" her before the trial began. Counsel stated that the investigator also went out "to try to find her" but was "unable to do so."

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<sup>1</sup> Because the same attorney represented the Petitioner both at trial and on direct appeal, she will be referred to as "counsel" rather than as "trial counsel" or "appellate counsel."

On cross-examination, counsel testified that Ms. Stagner did testify at trial.<sup>2</sup> Counsel stated that, not only was she unable to locate the witness before trial, but also that “there was . . . [evidence] that was not turned over.” Specifically, counsel stated that she never received discovery of a prior statement made by Ms. Stagner to Investigator Robert Miller<sup>3</sup> even though the State had agreed to provide all prior statements of witnesses. Counsel said that this statement was referenced at trial and she “made a pretty strenuous objection and they stopped right then and he was made to go get his case file and give me a copy of it.” Counsel stated that she believed that the “statement supported the Defense’s position.” She stated that she “moved for a mistrial” but that it was denied. She stated that, although the trial court “ordered the State to get her back so that she could cross examine her further,” “it wasn’t as effective as it would have been if she had had the statement when she initially cross-examined her.”

The Petitioner testified that, “[i]f the State was intending on using [Ms. Stagner] as a witness, [counsel] should have had the ability to contact her.” The Petitioner also posited that, “[i]f the State could contact her[,]” then counsel should have been able to do so. The Petitioner stated that counsel should have “continually push[ed] the issue” to attempt to locate and interview Ms. Stagner. The Petitioner stated that he believed that her failure to do so impacted his trial; however, the Petitioner provided no explanation of precisely how this impact occurred.

The post-conviction court found that counsel “did everything that was reasonable and necessary to locate Ms. Stagner before trial.” Furthermore, the post-conviction court found that “there was no proof . . . as to the specifics” of how counsel was ineffective “by not being prepared for the testimony of Ms. Stagner[.]” The post-conviction court found that counsel “cross examined [Ms. Stagner] and there was no showing that had [counsel] known of Ms. Stagner and interviewed her before trial, that there would have been any difference in the cross examination or any difference that would have been made in the outcome of this case.”

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<sup>2</sup> At trial, Ms. Stagner testified that the victim “lived across from” her at an apartment complex and that she “saw her about eight o’clock” the night before she was murdered. Ms. Stagner testified that she saw the victim “and a man fighting” in the apartment parking lot. Ms. Stagner testified that she “couldn’t hear anything . . . but there was physical contact . . . [and] it was loud.” Ms. Stagner stated that she watched the victim and the man argue for three to five minutes and that the victim was sitting inside a Jeep and the man was standing at the door of the vehicle. Ms. Stagner said that, eventually, she saw the man “move her over into the passenger side and him get in the driver’s side” while they were still continuing to argue. Ms. Stagner said that she left her residence at that time and never saw the victim leave. Ms. Stagner stated that, when she returned to her residence later that night, the Jeep was not at the location she had observed it at during the argument and that she did not see the victim again that night. On cross examination, Ms. Stagner denied ever telling any police officers that the victim got into the passenger side of the Jeep, even though Detective Miller had that in his notes. Ms. Stagner was recalled the next day, and she clarified that the man “didn’t physically move her” but that the victim “moved over” in the Jeep; however, she stated that this was because the man got into the car and “she ha[d] to move over, otherwise, he [was] going to sit on top of her.”

<sup>3</sup> Detective Miller testified that in his notes from interviewing Ms. Stagner, she claimed that the victim got into the passenger side of the Jeep rather than being forced from the driver’s seat to the passenger’s seat.

With regard to the delay to bring Ms. Stagner onto the witness stand to address these issues, the post-conviction court found that “it is more likely that the defense was able to make [a] better impact with that testimony by bringing a witness back and calling to attention in a setting two days later, that the witness had misstated something or had not been as forthcoming as [she] should have been[.]” Therefore, the post-conviction court found that “there was no showing that that was in any way prejudicial and that the trial [j]udge’s efforts to deal with that omission were somehow defective[.]”

## **2. Audiotape of Tia Ayers**

With regard to witness Tia Ayers, counsel testified that, after the trial, she became aware of a tape that the State “forgot to turn over” that contained “an interview between an officer of the Clarksville Police Department and one of the witnesses, Tia Ayers . . . .” Counsel testified that she “felt the tape directly supported the Defense’s position” because it discredited Tia Ayer’s hostile testimony about the Petitioner. At trial, Tia Ayers<sup>4</sup> stated that she was the victim’s best friend and that the victim “would have never wanted anything to do with him, she was afraid of him and she may have even said that [the victim] hated him.” However, on the tape, Tia Ayers testified that the victim had nonetheless remarried the Petitioner even after she had stated that she “wanted nothing to do with him.” Therefore, counsel stated that she felt the tape “would have been a very effective tool to show that not only what Ms. Ayers was saying [was] not correct, but the opposite was true.” Counsel testified that she raised the issue of the State’s failure to disclose the tape in the motion for a new trial and on direct appeal but that the “Court of Criminal Appeals determined that there was nothing exculpatory in the tape . . . .”

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<sup>4</sup> Ms. Ayers testified at trial that she had known the victim for two years before her death and was her friend and co-worker. Ms. Ayers stated that she spoke to the victim on the morning of the shooting and that the conversation was as follows:

[The victim] asked me to go feed Fat Cat. I asked her why? She said I didn’t go to work last night. I asked her was she with [the Petitioner] and she said yes. I asked her had he kidnaped her? And she said yes. I said do you want me to call the police? She said yes. At one point, I asked her I said where is [the Petitioner] and she said about four inches from me. I asked her were they in the red truck? She said no, something else. I said are you in Tennessee? She said no. I said are you in Kentucky? She just sort of went (inaudible)—yes. I said are you in Clarksville? She said yes. The last thing she said was, we’re at—and then the phone went dead.

Ms. Ayers stated that she then “called the police in Nashville and told them that her girlfriend had been kidnaped but she didn’t know where she was.” Ms. Ayers testified that she then “hit star 69” to trace the origination of the phone call and she “got the Econolodge” motel where the victim was killed.

Ms. Ayers also testified regarding the fall of 2006 in the time leading up until the victim’s death. Ms. Ayers said that she had spoken with the victim about her relationship to the Petitioner. Ms. Ayers stated that the victim “felt like [the Petitioner] was stalking her. She wanted him to leave her alone. They had already divorced.” Ms. Ayers stated that she was aware that the victim had met with the Petitioner at least once during the fall of 2006 and had requested that, “[a]nytime she had to meet with [the Petitioner], she would tell her to call her house in an hour. If she wasn’t home, she would want her to call the police.” Ms. Ayers stated that she did not think that the victim was having a romantic relationship with the Petitioner in the fall of 2006 and that it would surprise her to know if she were because the victim “was scared of him.”

The Petitioner testified that he had nothing that he wanted to address with regards to how counsel handled the audiotape of Tia Ayers. The Petitioner also explicitly testified that he did not believe that counsel's failure to obtain the audiotape of Tia Ayers impacted his trial, motion for a new trial, or appeal.

The post-conviction court found that this issue was presented in the motion for new trial and on appeal and "presumably was dealt with there." Furthermore, the post-conviction court found that "there is nothing shown to the [c]ourt that there was anything exculpatory or inconsistent in the testimony of Ms. Ayers or what would have been contained in the tape." The post-conviction court stated that the "issue must fail accordingly" because counsel "was not ineffective or deficient."

### **3. Phone Records between Petitioner and Victim**

With regard to the phone records between the Petitioner and the victim shortly before the murder occurred, counsel testified that she had subpoenaed all of the victim's phone records and introduced them as an exhibit at trial. Counsel stated that she reviewed the phone records to determine if the victim had contacted the Petitioner prior to the homicide to establish an ongoing relationship between the victim and the Petitioner and to refute the State's assertion that the victim was afraid of the Petitioner. Counsel stated that she did present evidence of the victim calling the Petitioner at trial. However, counsel testified that the Petitioner's phone was disconnected at some point before the victim's murder and that he was incarcerated<sup>5</sup> for a period of time and then used his roommate's phone number.

Counsel testified that, although she subpoenaed all records showing calls to the Petitioner's known number, she did not have records showing the roommate's phone records once the phone line was registered in his name. Counsel testified that, to further complicate the matter, the Petitioner told her "on numerous occasions" that he was unable to recall his roommate's telephone number, making it difficult to determine before trial whether the victim had been calling the Petitioner in the time shortly before her murder.

Counsel stated that, at trial, she was only able to show that phone calls took place after the Petitioner disconnected his phone to the city where the Petitioner resided but could not prove that these were phone calls between the Petitioner and the victim. Counsel stated that these phone calls occurred in late October and on November 6th. The most recent phone call that counsel was able to demonstrate with certainty at trial that the victim made to the Petitioner was "a month to forty-five days" before the murder and rape.

Counsel testified that, after trial, she received the phone records of the Petitioner's roommate and that she did not see "any calls made from [the Petitioner's roommate's] telephone to [the

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<sup>5</sup> The Petitioner's phone records while he was incarcerated were not entered into evidence. Counsel explained that the trial court ruled that, if the defense wished to introduce those records, the State would be able to state why the Petitioner was incarcerated. Counsel stated that she decided it would be more detrimental for the jury to hear that the Petitioner was "charged with kidnapping and rape of his other ex-wife" than it would have been to show that the Petitioner and the victim were having further ongoing conversations at that point in time.

victim's] phone" in the last days before the rape and murder. She testified that the last call between the Petitioner and the victim was on November 6th, which was contrary to the Petitioner's testimony that she called him "a day or so prior" to the rape and murder. Counsel stated that she felt she "should have had those" phone records at trial but that, "in looking at them since they came in," "they don't show" "what we wanted them" to show.

On cross-examination, counsel admitted that she could have further bolstered her position that the victim fostered an ongoing relationship with the Petitioner less than two weeks before the murder if she had had the phone records to confirm the calls in late October and early November were to the Petitioner. However, she reiterated that she was "really looking for . . . these records to show that within a day or two . . . that there was a phone call" as the Petitioner claimed. She stated that she was "surprised" to find this phone call was not listed in the records. Counsel also testified that, at trial, the State's position was that the victim had not wanted contact with the victim since "June or July" but that she refuted that at trial with the phone records that she did have in the Petitioner's name.

Counsel stated that, although she was not certain the phone records would have changed the degree of homicide the Petitioner was convicted of, she did feel like it could have refuted the especially aggravated kidnapping charges by showing that "the State's contention that [the victim] wanted nothing to do with [the Petitioner] was absolutely false." However, counsel again stated that she could not be sure "what effect [the records] might have had on the jury" and whether "two more phone calls from her to him" would have been enough to convince the jury that she was not kidnapped by the Petitioner.

The Petitioner stated that the phone records would have "[a]bsolutely" benefitted his case at trial because "[t]he State—stated and the witnesses stated that there was—that [the victim] wanted no contact, absolutely none whatsoever and the State during trial said that there was absolutely no phone calls after September 1st . . . ." The Petitioner stated that the "phone calls after September 1st, whether they be two or however many, prove that she was calling." The Petitioner said that would have been particularly beneficial to refute the State's witnesses who knew the victim and testified that she was not contacting the Petitioner.

The Petitioner further testified that he "could not remember" the phone number that would have appeared on the records. However, the Petitioner asserted that counsel "had the answer from the State the entire time" because, "within her folder . . . on an interview sheet to Roderick Smith[,]" the phone number and the Petitioner's address were listed. The Petitioner claims that counsel was ineffective for failing to notice the phone number was in her records and was "available" at the time of trial. The Petitioner stated that he did "agree" with counsel not to introduce the phone records while he was incarcerated because "it could have went either way on that one."

The post-conviction court found that this issue presented the "main thrust of [the Petitioner's] argument . . . that his Trial Counsel was ineffective[.]" The post-conviction court stated that the Petitioner believed these records "would have shown contact between the Petitioner and the victim,

‘shortly’ before her death.” The post-conviction court stated that the records showed phone calls between the victim and the Petitioner on October 21st and November 6th—only “twelve days before the beginning of the incidents, which led to the victim’s death on the 19th of the month of November.” The post-conviction court found that these “records were introduced at trial and were referred to but the [Petitioner] was not able to interpret those records to show that any calls had been made by the victim to him.” The post-conviction court found that counsel was “not ineffective” for failing to “notice a telephone number on a witness statement in the context of her asking her own client what a telephone number was and [he] couldn’t remember.”

The post-conviction court further found that, “[h]ad the records been available . . . in the format they were [at the time of the post-conviction hearing, the Petitioner] would not have been able to show anything more than what [had] been stipulated to.” Specifically, the post-conviction court stated that “[t]here was [already] proof introduced at trial to rebut the State’s contention and it was referred to in the Appellate Court decision.”

The post-conviction court noted that the evidence at trial showed that the phone calls were approximately “thirty to forty-five days” rather than as recent as twelve days before the incident. However, the post-conviction court found “that the failure of that evidence to be before the jury for its consideration, whatever its import or impact, [was] not due to ineffective assistance of counsel.” The post-conviction court found that the Petitioner’s “inability to note his own phone number or remember his own phone number or discover his own phone number from documents that were available to him prior to or during the trial” was the cause for the evidence not to be presented to the jury.

#### **4. Jury Tampering**

With regard to the issue of jury tampering, counsel testified as follows:

[A]fter the trial, it was made known to me by a Court Officer that on one of the occasions when the jury was taken to eat, . . . some of the female jurors went into the restroom and what was disclosed to me was that it was not believed that a Court Officer went with them, . . . and that . . . Nancy Leonard[, the Petitioner’s ex-wife,] who was one of the witnesses for the State . . . [who seemed to be] very much against [the Petitioner] and had . . . very much of a vested interest in seeing him convicted . . . was in the restroom at the same time that these female jurors were in there without a Court Officer.

Once that became known to me, I contacted [the defense investigator] and asked him to go out and talk to the jurors and see what he could find out about it? And he came back to me within a week or two and indicated that he had spoken with every juror on the case to determine if any of them became aware of anything as a result of that and all of the jurors denied that anything [inappropriate] happened in the restroom. The female jurors denied that and then all of the jurors said that there was no information disclosed to the jury as a result of that contact.

Based upon counsel's investigation of possible jury tampering, she did not raise an issue with the court. Counsel testified that she "looked at the case law on that and it [was] a very high burden . . . to meet in order to be successful on that." Counsel also stated that she felt the Petitioner "had some very good grounds for appeal" and that she "did not want to be raising issues" she did not feel would be successful.

The Petitioner testified that his complaint with regard to possible jury tampering was that he "never saw any documentation or had any knowledge of whether or not the State had any knowledge if the Court Officer informed [counsel]" that jurors may have had unsupervised contact with a witness. He testified that he had no personal knowledge of what occurred because he "was incarcerated at the time . . . ."

The post-conviction court found that counsel "did not pursue [the jury tampering issue] because she had no proof that there was any sort of inappropriate conduct." The post-conviction court stated that counsel was "[c]ertainly" not ineffective "by not pursuing what would have been an unprovable [sic] and may have even been viewed by the [c]ourt as being [a] frivolous allegation[.]"

## 5. Evidence Chain of Custody

Counsel also testified that there were potential chain-of-custody issues involving the evidence in the Petitioner's trial:<sup>6</sup>

What I remember was that in the discovery that I received from the State, I had copies of chain of custody forms that were not properly filled out . . . . I believe it was—it was items taken from the scene, from the motel. I can't recall exactly what it was, what the exact item was, . . . but they weren't filled out properly in that—the way that they are supposed to be filled out is that one person, the person that takes it into evidence, signs their name and fills in the columns and then when they turn it over to someone, everybody has to sign it and there is [a] specific way it is supposed to be filled out, and that was not done. Really—I can't recall any of them that were filled out appropriately, and I recall cross-examining [a witness] about that issue, at

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<sup>6</sup> Although no issue in the Petitioner's petition or amended petition referred to issues with the evidentiary chain of custody, which the State noted at the post-conviction hearing, the defense requested that the post-conviction court allow testimony on this issue based upon its relevance on the "cumulative error issue." The post-conviction court permitted such testimony so the Petitioner could have "a full hearing with regard to any matters that he contends were appropriate." Furthermore, the post-conviction court stated as follows:

[The Petitioner] has complained . . . of some evidentiary rulings and specifically with regard to the maintenance of evidence that was or was not used and introduced in this trial. That is not an issue that is contained in his petition or in the amended petition but the [c]ourt will consider that issue as well in making its ruling on [the Petitioner's] petition.

some length and he acknowledged—and some other detectives as well and they all acknowledged that they were not filled out properly.

Counsel further stated that some of these forms that had not been completed when she viewed them had “obvious[ly]” been “filled out after the fact.” Counsel stated, however, that the forms “were not done at the times the evidence was turned over which [was] the way that it [was] supposed to be done.” Counsel stated that she did cross-examine witnesses on this inconsistency and “felt that it showed sloppy investigation in this case.” Counsel objected “that the chain of custody was not properly shown,” and even though the trial court denied this objection, she renewed a “standing objection” regarding the chain of custody. However, counsel stated that she felt this was not a crucial issue to the jury in the case.

The Petitioner testified that “the State forged several forms” regarding the evidence chain of custody. The Petitioner stated that the “lead detective in the case intimated on the stand that he had forged several forms, [and] the same people that he forged those forms of, admitted on the stand that yes, those signatures were forged.” The Petitioner testified that the “lead detective also testified on the stand to the identity and identification of the evidence that he said on the stand that he never looked at.” The Petitioner then stated “an evidence custodian of the State . . . released evidence nineteen days after they initially received it from the incident” and that the “agent who initially identified all the evidence, who went to excruciating, very-detailed writings on every single thing that was in there, admitted on the stand that evidence was missing from a bag that was a key factor in the State’s case.”

When asked specifically what alleged evidentiary mistakes affected his trial, the Petitioner responded as follows:

[A] CID custody document, Item Number 6, it states “vest survival, mesh-type, cloth-type construction, green in color, used in condition with one set of pin flares, one folding lock-blade knife, two paper matchbooks, undetermined length of 550 cord and two plastic flex-type cuffs in the pockets” and it goes on with how they were marked with their numbers.

During trial, Agent Wunderlik (phonetic) who was the exact person who initially processed this, held these items up, identified them, after considerable amount of time, which [the trial judge] stated himself, that there indeed [was] one set of pin flares missing. He was asked if he had altered it in anyway, and he said no, but this was missing. Now, on this five-page document, there is well over a hundred of different items that they obtained from the vehicle. This is the only piece of evidence that they used during trial other than weapons and weapon-related material, this is the only item number from these sheets that they used during trial, the only one, and a black pair of gloves.

Now, the reason I bring this up is because the D.A. held these matchbooks up because they had Econo-Lodge on them—now, evidence was missing, that’s got to be incorrect procedure. To use these matchbooks to say that I had the vest on me and that that vest was in the motel room with me and after I stated that I didn’t have it on me, he used this to prove or to—to prove that I was in the room. How can you use evidence during trial that has been tampered with, when a chain of custody clearly says that there has been no tampering, loss or substitution? Not only in this same evidence here, but in another form—just one moment—that’s from the Clarksville Police Department, custody document within the group that the D.A. gave you, it says that they don’t even have possession of a knife. The knife which was an exact same item number, that Wunderlik, Agent Wunderlik held up, this was never argued or never brought up to the appellate level at all.

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One other thing—during the trial, they also held up a photo up, Exhibit Number 57, they called it, of evidence—a picture of all the evidence from the vehicle. They no longer after the nineteen days, eighteen/nineteen days, had possession of any of these items, yet they had Agent Wunderlik read the entire list, this five-page sheet, of all the evidence they had obtained from the vehicle. Now—within there, the reason they turned—let me backtrack a little bit. The reason they said they turned it over, because—and Detective Miller said this during testimony, that it had no value to the case. If it had no value to the case for the State, how come they did not allow the Defense to observe it as is required by Rule 16? Now, within that evidence, this same five-page document I am talking about, item number 15, it says “backpack civilian-type, cloth-type construction, green in color, used condition, containing one webbing strap-type belt, green in color, one snap link, one red cam stick light, one wrist compass and various pieces of torn paper” and Mr. Wunderlik writes this down as receipts. Receipts of what? No one will ever know, that evidence was turned over. That might have had a factor in the defense.

In summary, the Petitioner stated that “they had six items, other than weapons and weapons-related items, from all these evidence sheets, they kept six items.”

When asked about his counsel’s role in this error, the Petitioner acknowledged that counsel did raise the issue at trial. With regards to the appeal, the Petitioner stated that he did have “discussions about these issues” with counsel but that he did “not recall” any discussion with counsel about not raising the issues on appeal for tactical reasons. The Petitioner stated that counsel “had told me that she had enough, she felt that she had enough to where a retrial would be—I am not sure of the terminology, but given or however, decided. She told me that she had enough that she would need nothing else.”

The post-conviction court found that counsel “objected and continuously objected with regard to the matters . . . concerning the chain of custody of the evidence in this case. She cross-examined the witnesses with regard to that issue. She was able to establish . . . that the records had not been maintained properly and that documents had not been signed properly[.]” The post-conviction court found that, even though the trial judge allowed the evidence, the jury knew of the potential problems and “could consider that fact that the evidence had not been maintained properly and could consider the credibility [of] the officers[.]” The post-conviction court found that, although counsel determined that this “was an issue that was not appropriate for her to raise on appeal,” “it is not ineffective assistance of counsel on her part for her to have made that determination.”

Furthermore, the post-conviction court found that the Petitioner’s testimony “would indicate that his objection is not so much about the evidence that was received as the evidence that [wasn’t] received or wasn’t offered[.]” The post-conviction court noted “that it is not the obligation of the State [to] produce every item that might have been obtained, but only what the State considers relevant and important in this case”:

Furthermore, in light of [the Petitioner’s testimony], . . . it doesn’t appear that any of the evidentiary items that were introduced regardless of any errors that there may have been in the chain of custody, really impacted this case at all. [The Petitioner] admitted the weapon as an example, that he got it out of his car and that he had it and that he shot the victim with it. That’s from his testimony. So, given that, one wonders what the significance of, the importance in terms of the outcome of the case, would have been to any of the evidence that has been objected to today[.]

As such, the post-conviction court found that this issue was “properly determined at the trial level and [counsel] was correct in her assessment that that was not an issue that should have been raised on appeal.”

## **6. Additional Constitutional Claims**

The Petitioner also testified regarding his allegations that his conviction violated his constitutional right against double jeopardy,<sup>7</sup> that the jury instructions were unconstitutional,<sup>8</sup> that

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<sup>7</sup> The original petition raises the double-jeopardy claim as follows:

It is well established in criminal jurisprudence that a person cannot murder someone who is already dead, alternately, a person cannot be convicted of killing the same person twice. Stated otherwise, a person cannot be convicted of two (2) counts of First Degree Murder upon the same victim.

The principle behind double jeopardy is that a person should not be placed in a position to be exposed to double jeopardy. The illegality or illegal taint of double jeopardy is complete upon the defendant being put into a position to have double jeopardy occur. The constitutional tort is

(continued...)

the grand jury was “improper[,]”<sup>9</sup> and that the petit jury was unconstitutionally impaneled.<sup>10</sup> Rather than explaining his claims, the Petitioner stated, “I stand by my initial grounds on the petition . . . .”

With regard to these constitutional claims, the post-conviction court found that “there has been no elaboration on . . . those allegations or theories” and that “they are without any substantiation whatsoever in terms of testimony or proof.”

Therefore, the post-conviction court concluded that, “based on those findings, . . . there was no showing before the [c]ourt that [the Petitioner] was entitled to Post-Conviction relief, that he had

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<sup>7</sup>(...continued)

immediately complete when this happens and the illegal taint of the double jeopardy cannot be removed by blending or merging the separate convictions and[/]or sentences into one conviction or sentence.

In this case[,] the [P]etitioner was convicted by a jury of First Degree Premeditated Murder and simultaneously convicted of First Degree Felony Murder for having murdered the same victim under two differing theories of how the murder transpired.

<sup>8</sup> The original petition stated that the jury instructions were unconstitutional for the following reasons:

The jury instruction (or charge) given to the jury in regards to First Degree Premeditated Murder was unconstitutional because the trial judge failed to give or ommitted a “limiting instruction” to the jury, such as: “Upon finding that the defendant is guilty of First Degree Premeditated Murder, you shall immediately cease deliberations and need not determine the guilt or innocence of the defendant on the First Degree Felony Murder Charge.”

The failure to give the above limiting instruction or one similar to it, thereby allowed the jury to place the defendant in double jeopardy by deciding defendant’s guilt in regards to the First Degree Felony Murder charge after already having found the defendant guilty of First Degree Premeditated Murder.

<sup>9</sup> The original petition raises the unconstitutionally impaneled grand jury as follows:

The petitioner alleges that his convictions were based upon null and void indictments by an unconstitutionally selected and unconstitutionally impaneled grand jury of Montgomery County, Tennessee, in that the petitioner alleges that for the past Eleven (11) years and or longer and during the time that the petitioner was indicted, there had not been a Black Grand Jury Foreperson in Montgomery County, Tennessee, and that the exclusion of any Black Grand Jury Foreperson was the result of selective discrimination in the selection of the Montgomery County Grand Jury Foreperson.

The original petition also stated that counsel was ineffective at trial and on appeal for failing to raise the issue of the unconstitutionally impaneled grand jury.

<sup>10</sup> The original petition lists as error that the “[c]onviction was based on action of a grand or petit jury that was unconstitutionally selected or impaneled”; however, neither the original petition, the amended petition, nor the Petitioner’s brief on appeal elaborates on how the petit jury was unconstitutionally selected or impaneled.

been prejudiced in any way in these proceedings . . . [or] that Counsel was ineffective or that any of the other grounds raised in his petition or amended petition, entitle[d] him to Post-Conviction relief[.]” The post-conviction court subsequently entered a written order denying post-conviction relief. It is from this order denying relief that the Petitioner now appeals.

## ANALYSIS

### I. Ineffective Assistance of Counsel

On appeal, the Petitioner argues five claims of the ineffective assistance of trial and appellate counsel:<sup>11</sup> (1) counsel did not adequately investigate and prepare for witness Denise Stagner; (2) counsel did not receive an audiotape of Tia Ayers until after trial; (3) counsel inadequately prepared and investigated phone records between the Petitioner and the victim; and (4) counsel did not appeal any issues relating to the evidence chain of custody.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer’s assistance to his or her client is ineffective if the lawyer’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant’s lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as

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<sup>11</sup> Although the Petitioner phrases these issues separately, as previously noted, the same attorney represented the Petitioner at trial and on direct appeal. Furthermore, several of the Petitioner’s allegations of ineffective assistance of counsel at the trial level have the same factual basis for the Petitioner’s allegations of ineffective assistance on appeal. Because the standard of constitutional ineffective assistance does not delineate between trial and appellate assistance, we will address these claims under the sole topic of ineffective assistance.

of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

#### **A. Preparation for Witness Laquita Denise Stagner**

First, the Petitioner alleges that counsel rendered ineffective assistance of counsel by providing "inadequate preparation and investigation into witness Denise Stagner." The post-conviction court found that counsel "did everything that was reasonable and necessary to locate Ms. Stagner before trial." Furthermore, the post-conviction court found that "there was no proof . . . as to the specifics" of how trial counsel was ineffective "by not being prepared for the testimony of Ms. Stagner[.]" The post-conviction court found that counsel "cross examined [Ms. Stagner] and there was no showing that had [counsel] known of Ms. Stagner and interviewed her before trial, that there would have been any difference in the cross examination or any difference that would have been made in the outcome of this case."

The Petitioner argues that counsel should have located and interviewed Ms. Stagner before trial and should have "vigorously pursued all avenues to obtain all information available[.]" We conclude that the evidence does not preponderate against the post-conviction court's factual findings. Counsel testified that she and her investigator attempted to locate Ms. Stagner to no avail. Counsel testified that, when Ms. Stagner's prior statement to Detective Miller was mentioned, "she made a pretty strenuous objection" and "moved for a mistrial." Counsel further testified that the trial court ordered the witness to return so she could be fully cross-examined regarding the statement. We further conclude that the post-conviction court did not err in determining that counsel rendered effective assistance to her client. Counsel's efforts fell within the reasonable range of performance expected of counsel as she attempted to locate the witness before trial, thoroughly questioned the witness at trial, and objected to references to an undisclosed statement. Therefore, this issue has no merit.

#### **B. Audiotape of Tia Ayers**

Next, the Petitioner claims that counsel's failure to obtain the audiotape of Tia Ayers until after trial constituted ineffective assistance of counsel. The post-conviction court determined that counsel was not constitutionally deficient for failing to obtain the tape. Upon our review, we agree that the Petitioner did not establish by clear and convincing evidence that counsel's performance was lacking. In fact, the Petitioner did not assert at either the post-conviction hearing or in his brief on appeal any action that counsel could have taken that would have prevented this alleged error; on the

contrary, the Petitioner states on appeal that “[t]his situation is one that was totally extraneous of [counsel’s] ability” to prevent.

Despite this conclusion, the Petitioner further asserts that, according to United States v. Decoster, 487 F.2d 1197 (D.C. Cir. 1973), “even the best attorney may render ineffective assistance, often for reasons totally extraneous to his or her ability.” Id. at 1202 n.21. The Decoster Court also stated that “[i]t is important to stress that the issue in ineffectiveness cases is not a lawyer’s culpability, but rather the client’s constitutional rights.” Id. Our supreme court subsequently noted that it “measure[s] that range of competence by the duties and criteria as set forth in [Decoster].” See Hellard v. State, 629 S.W.2d 4, 8 (Tenn. 1982).

While the Decoster Court posited that the Sixth Amendment’s right to counsel may be offended by an error that is beyond counsel’s control, our overarching standard of effective assistance nonetheless requires that counsel provide reasonably competent assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936. The Decoster Court also stated that the proper standard for the effective assistance of counsel is that “a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.” 487 F.2d at 1202 (italics omitted). We conclude that counsel was not constitutionally deficient for failing to obtain this tape.

The post-conviction court found that the tape did not provide any evidence that was “exculpatory or inconsistent” with the trial testimony of Ms. Ayers. At the post-conviction hearing, the Petitioner stated that he did not believe counsel’s failure to obtain the audiotape of Tia Ayers impacted his trial, motion for a new trial, or appeal. Although counsel testified that this unknowing and unintentional error did significantly impact her client because the audiotape could have further called into question the status of the Petitioner’s relationship to the victim, the post-conviction court found to the contrary:

Ms. Ayers did testify . . . that the victim had met with the [Petitioner] on previous occasions since their divorce but explained that the victim had instructed Ms. Ayers to call her house and check on her well-being one hour after any meeting the victim had with the [Petitioner]. So the contact with the [Petitioner] was established through Ms. Ayers’ testimony.

Furthermore, this Court concluded that this audiotape was not highly relevant to the Petitioner’s trial. We stated on direct appeal, in relation to a claim regarding Brady v. Maryland, 373 U.S. 83 (1963), “the [audiotape] was not exculpatory nor favorable to the [Petitioner] and that it did not contain any material information which had not been otherwise disclosed . . . . Furthermore, Ms. Ayers was questioned thoroughly at trial concerning the victim’s relationship with the [Petitioner] . . . in an effort to show that they had an ongoing romantic relationship and the Court does not find that the [Petitioner] was hampered in any way by the State’s failure to turn over [the audiotape].” Leonard, 2002 WL 1987963, at \*20.

We conclude that, even if we were to find that counsel rendered deficient performance by not obtaining this tape during or before trial, the Petitioner nonetheless did not show the prejudice which he suffered from this alleged error. Because the tape appears to only have been cumulative proof that the Petitioner and the victim were maintaining some type of relationship despite their divorce, any alleged deficiency could not rise to the level of constitutionally ineffective assistance of counsel. The Petitioner did not establish the requisite prejudice, as is his burden, and therefore, we conclude that this issue is without merit.

### **C. Phone Records between Petitioner and Victim**

Next, the Petitioner claims that counsel provided ineffective assistance by failing to obtain complete phone records between the Petitioner and the victim at the time of trial. The post-conviction court found that, “[h]ad the records been available . . . in the format they are [at the time of the post-conviction hearing, the Petitioner] would not have been able to show anything more than what has been stipulated to.” Specifically, the post-conviction court stated that “[t]here was [already] proof introduced at trial to rebut the State’s contention and it [was] referred to in the Appellate Court decision.”

We agree with the post-conviction court that the Petitioner cannot show any deficiency of counsel. The Petitioner admits that he could not recall his own telephone number to assist counsel in obtaining the telephone records during the period when the Petitioner’s telephone was registered to his roommate, Roderick Smith. Furthermore, counsel did introduce evidence of phone calls between the Petitioner and the victim on October 21st and November 6th—only “twelve days before the beginning of the incidents, which led to the victim’s death on the 19th of the month of November.” Therefore, counsel did attempt to present to the jury as much evidence as possible of the supposed continuing relationship between the Petitioner and the victim. As the post-conviction court noted, even the testimony of the victim’s own friend, Ms. Ayers, solidified that the victim had been in contact with the Petitioner at some points even though she also claimed to be fearful of him. Therefore, we conclude that the post-conviction court did not err in finding that counsel did not render deficient performance by not obtaining complete phone records during trial.

Furthermore, even if we were to conclude that counsel rendered deficient performance, we cannot conclude that the Petitioner has demonstrated the requisite prejudice for constitutionally ineffective assistance of counsel. The post-conviction court duly noted that this evidence would have been cumulative proof at best of the alleged ongoing relationship between the Petitioner and the victim despite their divorce. Therefore, this issue has no merit.

### **D. Jury Tampering**

Next, the Petitioner asserts that counsel was ineffective for failing to bring to the trial court’s attention that a juror and a witness were unsupervised and alone together at a restaurant. The post-conviction court found that counsel “did not pursue [the jury tampering issue] because she had no proof that there was any sort of inappropriate conduct” and “[c]ertainly” had no constitutional duty to raise issues that were “unprovable and may have even been viewed by the [c]ourt as being [a] frivolous allegation[.]”

We agree with the post-conviction court that counsel was not deficient by deciding not to raise this issue at trial or on appeal. This was a tactical decision within the discretion of counsel to determine. At the post-conviction hearing, counsel stated that she researched the legal principles with regard to jury tampering and concluded that the Petitioner could not meet the heavy burden of proof required to demonstrate that error occurred. Therefore, counsel's assistance passes constitutional muster. Furthermore, the Petitioner has not alleged precisely how he suffered the requisite prejudice and has put forth no evidence of the adverse effects he endured based upon any meeting between a juror and a State's witness. Therefore, we conclude that this issue has no merit.

#### **E. Evidence Chain of Custody**

The Petitioner alleges that counsel was ineffective for not raising the issue of evidence chain of custody on appeal, thereby waiving his claims of error. The Petitioner now argues that counsel "should have raised every issue on appeal regardless of whether or not she thought she had enough for an appeal" to be successful. The Petitioner states that, because this claim is now waived, counsel's error "prejudices" his "ability to actively appeal his case."

The post-conviction court made extensive findings on this issue, even though the issue was not included in the petition for post-conviction relief or the amended petition. Generally, this Court does not address claims that were not raised in the initial petition or the amended petition for post-conviction relief:

It is unquestionable that a post-conviction petitioner limits the inquiry to the questions he raises therein. As in other civil actions, he cannot allege one case and prove another; he can rise no higher than the averments set out in his petition; no relief can be sought or given upon grounds not raised therein. A habeas corpus or post-conviction petition must necessarily rest upon and be determined by the factual allegations it contains. Without such rules of orderly procedure a trial degenerates into chaos. This is the clear undergirding principle of the established rule that an evidentiary hearing is not required and no relief can be granted in a post-conviction case when the petition states no ground for relief.

Long v. State, 510 S.W.2d 83 (Tenn. Crim. App. 1974). Therefore, the Petitioner's assertions regarding the evidence chain of custody should not have been considered by the post-conviction court. However, we choose to briefly discuss the merits of the Petitioner's claim.

The post-conviction court found that counsel "objected and continuously objected with regard to the matters . . . concerning the chain of custody of the evidence in this case. She cross-examined the witnesses with regard to that issue. She was able to establish . . . that the records had not been maintained properly and that documents had not been signed properly[.]" The post-conviction court found that, even though the trial judge allowed the evidence, the jury knew of the potential problems and "could consider that fact that the evidence had not been maintained properly and could consider the credibility [of] the officers[.]" The post-conviction court found that, although counsel determined that this "was an issue that was not appropriate for her to raise on appeal," "it is not ineffective assistance of counsel on her part for her to have made that determination."

We note that we must review the post-conviction court's findings of fact de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. The post-conviction court found that trial counsel objected strenuously to the evidence being admitted at trial and brought this issue before the jury by cross-examining witnesses on this subject. The post-conviction court also found that counsel made a tactical decision not to raise the issue on appeal. We do not believe the evidence preponderates against these findings.

Furthermore, we must review the legal conclusions on a purely de novo basis. We conclude that counsel did not render deficient performance because her decisions fell well within the acceptable and reasonable range of trial and appellate counsel. At trial, counsel objected to the introduction of the evidence and attempted to discredit it by questioning the evidentiary practices of the law enforcement officers. Counsel stated that she felt that this was not a crucial issue to the jury in the case, and it was a reasonable decision to not raise the issue on appeal.

Even if counsel had been deemed to be deficient, the Petitioner has failed to demonstrate that he experienced the requisite prejudice to offend the Sixth Amendment. With regard especially to the murder convictions, the Petitioner admitted to shooting his wife. Therefore, the issues of whether certain vests, backpacks, matchbooks, or other pieces of evidence were properly filed would likely have been of minimal concern. Additionally, the Petitioner did not meet his burden of demonstrating how these pieces of physical evidence implicated him in the especially aggravated kidnapping, rape, or the theft of the vehicle. As our Court noted on direct appeal, the theft conviction was based solely on the testimony of Patricia Brantley, who loaned the Petitioner her vehicle which he did not return. Therefore, even if counsel were to be deemed deficient, the Petitioner did not demonstrate prejudice. As such, this issue has no merit.

#### **F. Cumulative Error**

Finally, the Petitioner asserts that counsel was ineffective based upon the doctrine of cumulative error. Under this theory, the Petitioner asserts that the aggregate total of counsel's errors, while not individually prejudicing his trial, did amount to prejudice when taken as a whole. Specifically, the Petitioner states that the "cumulative errors of [counsel] not adequately preparing or investigating for witness LaQuita Denise Stagner, audio tape related to Tia Ayers, and phone records constitutes deficient representation . . . ."

Our Court has previously noted that a Petitioner who has failed to show that he received constitutionally deficient representation on any single issue may not successfully claim that his constitutional right to counsel was violated by the cumulative effect of counsel's errors. Leon J. Robins v. State, No. M2005-01204-CCA-R3-PC, 2006 WL 1816361, at \*20 (Tenn. Crim. App., Nashville, June 27, 2006), perm to appeal denied, (Tenn. Oct. 30, 2006); Antonio Jackson v. State, No. W2004-00328-CCA-R3-PC, 2005 WL 729147, at \*4 (Tenn. Crim. App., Jackson, Mar. 29, 2005); Terry Proffitt v. State, No. E2003-00250-CCA-R3-PC, 2004 WL 50797, at \*3 (Tenn. Crim. App., Knoxville, Jan. 12, 2004). We conclude that the post-conviction court did not err by finding

that the Petitioner did not prove deficient representation on any issue. Therefore, this issue has no merit.

#### **G. Other Claims of Ineffective Assistance**

Finally, the initial petition for post-conviction relief alleged that counsel was ineffective by not raising other constitutional issues at the appropriate stages and that this has prejudiced the Petitioner's case. Specifically, the initial petition stated that additional issues of a double-jeopardy violations, improper jury instructions, and an unconstitutionally selected and impaneled petit and grand jury were not properly raised by counsel. The post-conviction court heard testimony regarding these issues. The Petitioner does not explicitly raise in his brief on appeal that counsel was ineffective in raising any of these issues but merely "requests this Honorable Court to consider these claims, and any other not specifically addressed, on the merits of his Petition."

We conclude that the Petitioner has waived these issues on appeal. The Petitioner's brief does not contain any argument that counsel was ineffective for failing to raise these issues. The Petitioner's brief does assert them as free-standing claims requesting relief, as we will discuss below, but the issue of ineffective assistance is simply not presented on appeal. The Petitioner cites no law or references no factual grounds regarding how counsel was ineffective on these issues, as required by Rule 27(a)(7) of the Tennessee Rules of Appellate Procedure. Furthermore, in the sections of the Petitioner's brief where he does discuss the ineffective assistance of trial and appellate counsel, there is no reference to counsel's performance with regard to these issues. Therefore, we must conclude that the issues are waived.

#### **II. Other Constitutional Claims**

The Petitioner also claims that his "conviction was based on a violation of the protection against double jeopardy, conviction was based on action of a grand jury or petit jury that was unconstitutionally selected or impaneled, and that the jury charge given to the jury by the trial judge was unconstitutional." The Petitioner's brief on appeal does not provide any factual basis or legal support for these claims but merely "requests this Honorable Court to consider these claims, and any other not specifically addressed, on the merits of his Petition."

These claims are not properly before this court on an appeal for post-conviction relief. Under Tennessee Code Annotated section 40-30-106:

(g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Tenn. Code Ann. § 40-30-106(g). These claims were not raised by the Petitioner on direct appeal, which was the proper time for these claims to have been addressed. These claims do not arise from any constitutional right that did not exist at the time. The Petitioner had the right to assert that the failure to present these grounds was based upon his constitutional right to the effective assistance of counsel, as we have previously discussed, but he has failed to do so. Therefore, we conclude that the Petitioner has waived these issues on appeal.

### **Conclusion**

Based upon the foregoing reasoning and authorities, we affirm the denial of the Petitioner's petition for post-conviction relief.

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DAVID H. WELLES, JUDGE